

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

Stephen Hunter

v.

Case No. 15-cv-421-PB

Carolyn W. Colvin, Acting
Commissioner, Social
Security Administration

REPORT AND RECOMMENDATION

Pursuant to 42 U.S.C. § 405(g), Stephen Hunter moves for an order reversing the Acting Commissioner's decision to deny his applications for Social Security disability insurance benefits, or DIB, under Title II of the Social Security Act, 42 U.S.C. § 423, and for supplemental security income, or SSI, under Title XVI, 42 U.S.C. § 1382. The Acting Commissioner, in turn, moves for an order affirming her decision. For the reasons that follow, this matter should be remanded to the Acting Commissioner.

I. Standard of Review

The applicable standard of review in this case provides, in pertinent part:

The [district] court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of

the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive

42 U.S.C. § 405(g) (setting out the standard of review for DIB decisions); see also 42 U.S.C. § 1383(c)(3) (establishing § 405(g) as the standard of review for SSI decisions). However, the court “must uphold a denial of social security . . . benefits unless ‘the [Acting Commissioner] has committed a legal or factual error in evaluating a particular claim.’” Manso-Pizarro v. Sec’y of HHS, 76 F.3d 15, 16 (1st Cir. 1996) (per curiam) (quoting Sullivan v. Hudson, 490 U.S. 877, 885 (1989)).

As for the statutory requirement that the Acting Commissioner’s findings of fact be supported by substantial evidence, “[t]he substantial evidence test applies not only to findings of basic evidentiary facts, but also to inferences and conclusions drawn from such facts.” Alexandrou v. Sullivan, 764 F. Supp. 916, 917-18 (S.D.N.Y. 1991) (citing Levine v. Gardner, 360 F.2d 727, 730 (2d Cir. 1966)). In turn, “[s]ubstantial evidence is ‘more than [a] mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” Currier v. Sec’y of HEW, 612 F.2d 594, 597 (1st Cir. 1980) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)). But, “[i]t is the responsibility of the [Acting Commissioner] to determine issues of credibility and to

draw inferences from the record evidence. Indeed, the resolution of conflicts in the evidence is for the [Acting Commissioner], not the courts." Irlanda Ortiz v. Sec'y of HHS, 955 F.2d 765, 769 (1st Cir. 1991) (per curiam) (citations omitted). Moreover, the court "must uphold the [Acting Commissioner's] conclusion, even if the record arguably could justify a different conclusion, so long as it is supported by substantial evidence." Tsarelka v. Sec'y of HHS, 842 F.2d 529, 535 (1st Cir. 1988) (per curiam). Finally, when determining whether a decision of the Acting Commissioner is supported by substantial evidence, the court must "review[] the evidence in the record as a whole." Irlanda Ortiz, 955 F.2d at 769 (quoting Rodriguez v. Sec'y of HHS, 647 F.2d 218, 222 (1st Cir. 1981)).

II. Background

The parties have submitted a Joint Statement of Material Facts. That statement, document no. 12, is part of the court's record and will be summarized here, rather than repeated in full.

In February of 2012, Hunter was hospitalized for three days. His hospitalization resulted from complaints of abdominal pain and a rash that covered his right ankle, hips, wrists, and arms. He was discharged with a diagnosis of leukocystoclastic

vasculitis,¹ secondary to a virally mediated gastroenteritis. In May and June of 2012, Hunter received diagnoses of Henoch-Schönlein purpura ("HSP")² and mild crescentic IgA nephropathy with normal renal function.³ He last worked in May of 2012. Regarding the end of his employment, a medical note generated upon about six months later, upon a hospital admission for psychiatric issues, reports:

After a successful career in business, the patient was diagnosed about 8 months ago with vasculitis and subsequently with IGA nephropathy. As he missed many days of work at his then-employer, Sears Roebuck, where he was the cashier lead person, he was relieved of his job responsibilities.

Administrative Transcript (hereinafter "Tr.") 2002.

Hunter applied for DIB and SSI in June of 2012, claiming to have become disabled on June 2, 2012. In support of his applications, he submitted a Function Report in which he

¹ Leukocystoclastic vasculitis is "characterized clinically by palpable purpura, especially of the legs . . . [and] may be limited to the skin or involve other tissues as in Henoch-Schönlein purpura." Stedman's Medical Dictionary 2092 (28th ed. 2006). Purpura is "[a] condition characterized by hemorrhage into the skin." Id. at 1606.

² Henoch-Schönlein purpura is "an eruption of non-thrombocytopenic palpable purple lesions due to dermal leukocytoclastic vasculitis with IgA in vessel walls associated with joint pain and swelling, colic, and bloody stools" Stedman's, supra note 1, at 1606.

³ Nephropathy is "[a]ny disease of the kidney." Stedman's, supra note 1, at 1291.

described his daily activities this way:

Wake up, eat breakfast, take morning meds, usually
fall asleep, wake up[,] eat lunch[,] watch TV, fall
asleep, eat dinner, walk dogs[,] watch TV[,] take
night meds[,] go to bed.

Tr. 1845. Hunter also indicated that he: (1) fed and walked two dogs with help from his fiancée; (2) spent 20 minutes a day preparing leftovers or sandwiches; and (3) spent 20 or 30 minutes, "a couple of times each week," doing laundry or cleaning. With regard to his general energy level, he reported: (1) "being on medication[,] I am always exhausted and don't even want to get out of bed on most days," Tr. 1844; (2) "I am constantly sleeping," Tr. 1845; and (3) "I do much more watching soccer [on television] and less time gardening and fishing since I am usually too tired to go out," Tr. 1848. In response to the question "[h]ow well do you handle stress," Hunter responded "handle stress well," and in response to the question "[h]ow well do you handle changes in routine," he responded "handle changes well." Tr. 1850.

After Hunter applied for SSI and DIB, a non-examining state agency consultant, Dr. Jonathan Jaffe, reviewed Hunter's medical records to assess his physical residual functional capacity ("RFC").⁴ According to Dr. Jaffe, Hunter's RFC was sufficient to

⁴ "Residual functional capacity" is a term of art that means "the most [a claimant] can still do despite his limitations."

satisfy the exertional demands of medium work, as defined by 20 C.F.R. §§ 404.1567(c) and 416.967(c).

In September of 2012, the Social Security Administration ("SSA") referred Hunter to Dr. Mark Ciocca, a psychologist, for a consultative examination. Based upon the results of that examination, Dr. Ciocca completed a Mental Health Evaluation Report on Hunter. Dr. Ciocca indicated a diagnosis of bipolar disorder. With respect to Hunter's current level of functioning, Dr. Ciocca offered several opinions, including these:

The claimant is unable to maintain attention and concentration in order to persist at, and complete tasks.

. . . .

Mr. Hunter is currently unable to tolerate stressors common to the work situation, and to maintain consistent attendance.

Tr. 1984-85. Finally, Dr. Ciocca gave the following prognosis: "Given the stressor that Mr. Hunter's illness creates, it seems that he will have mood difficulties for the foreseeable future. Therefore, his prognosis is only fair." Tr. 1985.

After Dr. Ciocca performed his consultative examination, a non-examining state agency psychological consultant, Dr. Therese Harris, reviewed Hunter's medical records, including Dr.

20 C.F.R. §§ 404.1545(a)(1) & 416.945(a)(1).

Ciocca's evaluation, and assessed his mental RFC. According to Dr. Harris, Hunter had some understanding and memory limitations and some sustained concentration and persistence limitations, but no limitations in the areas of social interaction and adaptation. With respect to understanding and memory, Dr. Harris opined that Hunter had "[s]ome forgetfulness/ memory limitations, but [was] able to recall and manage simple tasks." Tr. 1696, 1709. With respect to sustained concentration and persistence limitations, Dr. Harris opined that Hunter had "[s]ome difficulties with focus and concentration, but [was] able to maintain focus, pace, and persistence for simple tasks for 2-hour periods within a normal 40-hour work schedule." Tr. 1696, 1709.

Then, after noting that Dr. Ciocca's opinion included more restrictive limitations than those in her opinion, Dr. Harris explained:

[Dr. Ciocca's] statement of limitations is not consistent with the [claimant's] presentation at [Dr. Ciocca's examination] and is difficult to explain unless it reflects limitations due to BOTH the [claimant's] somatic issues and [psychological] issues. These statements are therefore given limited weight. [Dr. Ciocca] notes [claimant] is unable to tolerate stress, but the [claimant] himself states on his Functional Report that he manages stress well. Fully credible.

Tr. 1697 (emphasis added).

In November of 2012, after Drs. Ciocca and Harris assessed his physical and mental RFCs, Hunter was voluntarily admitted to the inpatient psychiatric unit at Concord Hospital for approximately 10 days because he was having suicidal thoughts. At Concord Hospital, he was diagnosed with major depressive disorder. On admission, he had a global assessment of functioning ("GAF")⁵ score of 32,⁶ and at discharge, he had a GAF of 56.⁷ In December of 2012, Hunter spent five days in the Behavioral Health Unit of Southern New Hampshire Medical Center

⁵ "GAF . . . provides a means for mental health professionals 'to turn raw medical signs and symptoms into a general assessment, understandable by a lay person, of an individual's mental functioning.'" Phaneuf v. Colvin, No. 13-cv-139-LM, 2014 WL 2864727, at *2 n.3 (D.N.H. June 24, 2014) (quoting Gonzalez-Rodriguez v. Barnhart, 111 F. App'x 23, 25 (1st Cir. 2004); citing American Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders 32 (4th ed., text rev. 2000)).

⁶ "A GAF score of 31-40 indicates '[s]ome impairment in reality testing or communication (e.g., speech is at times illogical, obscure, or irrelevant) [or] major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood (e.g., depressed man avoids friends, neglects family, and is unable to work; child frequently beats up younger children, is defiant at home, and is failing at school).'" Brindley v. Colvin, No. 14-cv-548-PB, 2016 WL 355477, at *3 n.2 (D.N.H. Jan. 29, 2016) (citation to the record omitted).

⁷ "A GAF score of 51 to 60 represents moderate symptoms." Phaneuf, 2014 WL 2864727, at *2 n.3 (citing Jones v. Astrue, No. 1:10-cv-179-JAW, 2011 WL 1253891, at *3 n.4 (D. Me. Mar. 30, 2011)).

("SNHMC") as a result of compelling homicidal ideation. At SNHMC, he was diagnosed with bipolar disorder, recurrent, mixed. On admission, he had a GAF of 35, and at discharge, he had a GAF of 50.⁸

After he was released from Concord Hospital, Hunter received five sessions of mental health counseling, over the course of approximately two months, from Sheena Bice. Upon her initial examination, Bice gave Hunter preliminary diagnoses of mood disorder and impulse disorder, and gave rule-out diagnoses of bipolar disorder and intermittent explosive disorder.⁹ She also assessed Hunter as having a GAF of 50.

After the SSA denied Hunter's application for benefits, he received a hearing before an Administrative Law Judge ("ALJ"). Thereafter, the ALJ issued a decision that includes the following relevant findings of fact and conclusions of law:

⁸ "A GAF score between 41 and 50 indicates '[s]erious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) [or] any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job).'" Brindley, 2016 WL 355477, at *3 n.2 (citation to the record omitted).

⁹ "'Rule-out' in a medical record means that the disorder is suspected but not confirmed – i.e., there is evidence that the criteria for a diagnosis may be met, but more information is needed in order to rule it out." Byes v. Astrue, 687 F.3d 913, 916 n.3 (8th Cir. 2012) (citing United States v. Grape, 549 F.3d 591, 593 n.2 (3d Cir. 2008)).

3. The claimant has the following severe impairments: Henoch-Schonlein purpura/vasculitis, IgA nephropathy (glomerulonephritis), and bipolar disorder (20 CFR 404.1520(c) and 416.920(c)).

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4. The claimant does not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and 416.926).

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5. After careful consideration of the entire record, the undersigned finds that the claimant has the residual functional capacity to perform medium work as defined in 20 CFR 404.1567(c) and 416.967(c), meaning he can lift and carry 50 lbs. occasionally and 25 lbs. frequently, stand or walk for 6 hours in an 8-hour workday, and sit for 6 hours in an 8-hour workday. The claimant has the ability to focus, persist, and keep pace in the performance of simple tasks, meaning one-to-three step workplace tasks.

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6. The claimant is unable to perform any past relevant work (20 CFR 404.1565 and 416.965).

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10. Considering the claimant's age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy that the claimant can perform (20 CFR 404.1569, 404.1569(a), 416.969, and 416.969(a)).

Tr. 1658, 1660, 1664. Based upon his assessment of Hunter's RFC, and a hypothetical question posed to a vocational expert that incorporated the RFC recited above, the ALJ determined that

Hunter was able to perform the jobs of night janitor, hand packager, and order picker.

III. Discussion

A. The Legal Framework

To be eligible for disability insurance benefits, a person must: (1) be insured for such benefits; (2) not have reached retirement age; (3) have filed an application; and (4) be under a disability. 42 U.S.C. §§ 423(a)(1)(A)-(D). To be eligible for supplemental security income, a person must be aged, blind, or disabled, and must meet certain requirements pertaining to income and assets. 42 U.S.C. § 1382(a). The question in this case is whether the ALJ correctly determined that Hunter was not under a disability from June 2, 2012, through March 11, 2014, which is the date of the his decision.

To decide whether a claimant is disabled for the purpose of determining eligibility for either DIB or SSI benefits, an ALJ is required to employ a five-step process. See 20 C.F.R. §§ 404.1520 (DIB) & 416.920 (SSI).

The steps are: 1) if the [claimant] is engaged in substantial gainful work activity, the application is denied; 2) if the [claimant] does not have, or has not had within the relevant time period, a severe impairment or combination of impairments, the application is denied; 3) if the impairment meets the conditions for one of the "listed" impairments in the Social Security regulations, then the application is

granted; 4) if the [claimant's] "residual functional capacity" is such that he or she can still perform past relevant work, then the application is denied; 5) if the [claimant], given his or her residual functional capacity, education, work experience, and age, is unable to do any other work, the application is granted.

Seavey v. Barnhart, 276 F.3d 1, 5 (1st Cir. 2001) (citing 20 C.F.R. § 416.920).

The claimant bears the burden of proving that he is disabled. See Bowen v. Yuckert, 482 U.S. 137, 146 (1987). He must do so by a preponderance of the evidence. See Mandziej v. Chater, 944 F. Supp. 121, 129 (D.N.H. 1996) (citing Paone v. Schweiker, 530 F. Supp. 808, 810-11 (D. Mass. 1982)). Finally,

[i]n assessing a disability claim, the [Acting Commissioner] considers objective and subjective factors, including: (1) objective medical facts; (2) [claimant]'s subjective claims of pain and disability as supported by the testimony of the [claimant] or other witness; and (3) the [claimant]'s educational background, age, and work experience.

Mandziej, 944 F. Supp. at 129 (citing Avery v. Sec'y of HHS, 797 F.2d 19, 23 (1st Cir. 1986); Goodermote v. Sec'y of HHS, 690 F.2d 5, 6 (1st Cir. 1982)).

B. Hunter's Claims

Hunter claims that the ALJ erred by: (1) failing to determine that his Henoch-Schönlein purpura met or medically equaled the severity of the listing for systemic vasculitis, i.e., Listing 14.03; (2) assigning him an RFC that was not

supported by substantial evidence; and (3) making a flawed credibility assessment. Hunter's first two arguments are both meritorious.

1. Step Three

To show that an impairment meets Listing 14.03, a claimant must demonstrate certain clinical findings¹⁰ that are accompanied by:

A. Involvement of two or more organs/body systems, with:

1. One of the organs/body systems involved to at least a moderate level of severity; and
2. At least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss).

or

B. Repeated manifestations of systemic vasculitis, with at least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss) and one of the following at the marked level:

1. Limitation of activities of daily living.
2. Limitation in maintaining social functioning.

¹⁰ It appears to be undisputed that Hunter has demonstrated the requisite clinical findings. The applicable regulation provides that "tissue biopsy confirms a diagnosis of systemic vasculitis," 20 C.F.R., Pt. 404, Subpt. P., App. 1, 14.00D.2.b. In his RFC assessment, Dr. Jaffe noted: "there is Henoch-Schonlein purpura, biopsy proven proliferative glomerulonephritis." Tr. 1695.

3. Limitation in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace.

20 C.F.R. Pt. 404, Subpt. P., App. 1, Listing 14.03.

In his decision, the ALJ gave the following explanation for his determination that Hunter had not established that his HSP met Listing 14.03:

although the claimant complains of fatigue, malaise, and weight loss, the evidence establishes [that] these symptoms are not particularly severe, as evidenced by the claimant's previous ability to work at SGA [substantial gainful activity] levels, and his robust level of activities (See, e.g., Exhibit 5E [i.e., the Function Report quoted above]), and it is not clear from the evidence that the claimant's vasculitis is such that it involves two or more organs, or body systems, with the involvement of one of the organs or body systems being to at least a moderate level of severity. Further, the claimant's symptoms have not caused him to suffer marked limitations in the performance of his activities of daily living, his social functioning, or his ability to complete tasks in a timely manner because of deficiencies in concentration, persistence and pace.

Tr. 1658-59. The Acting Commissioner defends the ALJ's finding by pointing out that Dr. Jaffe found that Hunter's HSP did not meet Listing 14.03, and that the record includes no medical opinion that Hunter's HSP did meet Listing 14.03.

While the Acting Commissioner relies upon Dr. Jaffe's determination that Hunter's HSP did not meet Listing 14.03, the ALJ did not mention Dr. Jaffe's determination, and it is not for the Acting Commissioner, or the court, to fashion rationales for

the ALJ that the ALJ did not articulate. See Haggblad v. Astrue, No. 11-cv-028-JL, 2011 WL 6056889, at *13 (D.N.H. Nov. 17, 2011), R & R adopted by 2011 WL 6057750 (Dec. 6, 2011) (citing High v. Astrue, No. 10-cv-69-JD, 2011 WL 941572, at *6 (D.N.H. Mar. 17, 2011); Dube v. Astrue, No. 1:10-cv-179-JL, 2011 WL 742520, at *6 n.15 (D.N.H. Feb. 24, 2011); Laplume v. Astrue, No. 08-cv-476-PB, 2009 WL 2242680, at *6 n.20 (D.N.H. July 24, 2009) ("I cannot uphold the ALJ's decision based on rationales unarticulated in the record.")). That leaves for the court's analysis the rationale the ALJ did give. That rationale is not supported by substantial evidence.

First, the ALJ says that "it is not clear from the evidence that the claimant's vasculitis is such that it involves two or more organs, or body systems, with the involvement of one of the organs or body systems being to at least a moderate level of severity." Tr. 1659. Regarding the involvement of two or more organs or body systems, Dr. Jaffe noted that Hunter's "kidney biopsy showed diffuse proliferative glomerulonephritis," Tr. 1695, and that Hunter "has continued to have skin rash," id. Hunter's kidney and skin count as two organs or body systems. As for severity, on May 17, 2012, Dr. Eugene Kissin, a treating rheumatologist, wrote:

Mr. Hunter has an unusual leukocytoclastic vasculitis that involves [a] very large surface area of skin more

extensive than what is usually seen. He also did not respond to two courses of prednisone which is unusual for leukocytoclastic vasculitis.

Tr. 1910. On June 7, 2012, Dr. Ramon Bonegio, another treating physician, called Hunter's skin rash "the most diffuse and persistent rash that [he had] seen in an adult." Tr. 1890. The rash that Drs. Kissin and Bonegio described certainly demonstrates involvement of a body system that is at least moderately severe. Because the ALJ points to no contrary evidence, but relies exclusively upon his own doubts about the evidence cited above, the court concludes that substantial evidence does not support a finding that Hunter has failed to establish the involvement of two organs or body systems, and moderately severe involvement in one.

The ALJ's finding regarding the constitutional symptoms or signs of systemic vasculitis is equally infirm. To begin, it is not clear how a claimant's ability to perform substantial gainful activity before the alleged onset date of his claimed disability sheds any light on the severity of his symptoms after the alleged onset date.¹¹ Viewed in the light most favorable to the ALJ's decision, the evidence he cites to demonstrate

¹¹ Moreover, the ALJ's reliance upon Hunter's ability to perform substantial gainful activity would seem to be undermined by the fact that Hunter was discharged from his position at Sears due to absences resulting from his HSP.

Hunter's "robust level of activities" shows, at most, that Hunter eats three meals a day, spends 20 minutes a day preparing sandwiches or leftovers, takes medication twice a day, watches television, feeds and walks two dogs with the help of his fiancée, and spends 40 to 60 minutes a week doing laundry and housekeeping. That list of activities, in conjunction with Hunter's statements that he is "always exhausted and [doesn't] even want to get out bed on most days" and is "constantly sleeping" is not evidence a reasonable mind would accept as sufficient to support a conclusion that Hunter has failed to establish the constitutional symptoms of severe fatigue and malaise.¹²

Because the ALJ's determination that Hunter has failed to establish that his HSP satisfies the criteria stated in Listing 14.03, this matter should be remanded.

2. RFC Assessment

Hunter also claims that the ALJ made an RFC assessment that is not supported by substantial evidence. Specifically, he

¹² Regarding another constitutional symptom or sign, there is no medical evidence of involuntary weight loss after June 2, 2012, the date on which Hunter claims to have become disabled, and if anything, the record demonstrates weight gain as a result of Hunter's use of the prednisone that was prescribed for his HSP. However, there is evidence in the medical record that in February of 2012, the month in which he was hospitalized for vasculitis, Hunter lost ten pounds. See Tr. 1898.

argues that the ALJ erred by failing to properly consider: (1) Dr. Ciocca's opinion; (2) the combined effects of his physical and mental impairments; (3) his recent mental-health treatment; and (4) his low back pain. Taken together, Hunter's first three arguments describe an error by the ALJ that warrants a remand.

In his decision, the ALJ found Hunter to have an RFC that included a limitation on his ability to focus, persist, and keep pace, but he found no limitations resulting from an inability to tolerate workplace stressors. In Hunter's view, an RFC that includes no stress-related limitation is not supported by substantial evidence. The court agrees.

In his Mental Health Evaluation Report, Dr. Ciocca described Hunter's mood this way:

Mr. Hunter's mood was generally euthymic. He denied any current persistent depression, but reports that he does have some suicidal feelings due to his illness, his level of debt, and the fact that he is unemployed. He reports some lack of motivation which he attributes to his level of fatigue, and also reports some anhedonia. There is significant hypersomnia.¹³

The claimant denies any current anxiety or panic. He does report chronic worry about money and about his illness. He reports fluctuating appetite.

¹³ Euthymia is defined as "[j]oyfulness; mental peace and tranquility" or as "[m]oderation of mood, not manic or depressed." Stedman's, supra note 1, at 678. Anhedonia is the "[a]bsence of pleasure from the performance of act that would ordinarily be pleasurable." Id. at 93. Hypersomnia is "[a] condition in which sleep periods are excessively long, but the person responds normally in the intervals, distinguished from somnolence." Id. at 926.

Tr. 1983 (emphasis added). Dr. Ciocca also reported that Hunter's "[t]hought content was largely focused on [his] physical illness and symptoms." Id. Subsequently, Dr. Ciocca opined that "Mr. Hunter is currently unable to tolerate stressors common to the work situation, and to maintain consistent attendance." Tr. 1985.

In his decision, the ALJ "gave little weight" to Dr. Ciocca's opinion "because it was internally inconsistent." Tr. 1663. With respect to Dr. Ciocca's opinion that Hunter was "unable to maintain attention and concentration in order to persist at, and complete tasks," Tr. 1984, the ALJ's decision would appear to be well-founded; in his examination notes, Dr. Ciocca reported that Hunter's "memory, attention, and concentration were within normal limits." Tr. 1983. But with respect to Dr. Ciocca's opinion on Hunter's ability to tolerate workplace stressors, the court reaches a different conclusion.

The ALJ explained his rejection of Dr. Ciocca's opinion on Hunter's ability to tolerate workplace stressors this way:

[Dr. Ciocca] identified somewhat benign psychological signs and symptoms, yet concluded [that] the claimant would be . . . unable to tolerate workplace stressors For example, as noted above, at the consultative examination, Dr. Ciocca noted "no abnormalities of gait, posture, or general appearance." He stated that the claimant arrived on time; he appeared casually dressed; and he was "fairly well groomed." He remarked [that] the claimant was

pleasant and cooperative. Although his speech was somewhat quiet and subdued . . . [it] was [nevertheless] logical and spontaneous." The claimant's mood was described as "generally euthymic," and the claimant denied "any current persistent depression." While his affect was "somewhat flat" and "somewhat limited," he was alert, and oriented to the day, the date, and the time. There was no evidence of hallucinations. In addition, the claimant's memory, attention, and concentration were within normal limits, and his intellect and fund of general knowledge were estimated as average. Simply stated, the disabling level of limitations Dr. Ciocca opined the claimant would be under is inconsistent with the relatively benign psychological signs and symptoms reflected in his report of his examination of the claimant, so I gave it little weight. Further, Dr. Ciocca's conclusion [that] the claimant would be unable to tolerate workplace stress stands in stark contrast to the claimant's own statements that he could handle stress, and adapt to changes in routine "well." I gave his opinion little weight because it was contradicted by the claimant's somewhat robust level of activities, his rather benign allegations of limitations contained in his function report, his lack of psychological treatment over the last year, and his appropriate and capable presentation before me at the hearing in this case.

Tr. 1663-64 (citations to the record omitted).

If Dr. Ciocca's opinion was inconsistent with or unsupported by his clinical observations and findings, that would be substantial evidence in support of the ALJ's decision to discount that opinion. See 20 C.F.R. §§ 404.1527(c) & 416.927(c). Indeed, the ALJ's decision lists numerous observations of Hunter that Dr. Ciocca included in his report. But it is not readily apparent how Hunter's normal gait, fairly good grooming, logical and spontaneous speech, or any of the

other things Dr. Ciocca observed, would be inconsistent with an inability to tolerate workplace stressors, and the ALJ does not explain the connections. Thus, there is not substantial evidence to support the ALJ's determination that Dr. Ciocca's opinion on Hunter's ability to tolerate workplace stressors is inconsistent with his clinical observations and findings.

The ALJ also discounted Dr. Ciocca's opinion because it stood "in stark contrast to the claimant's own statements that he could handle stress, and adapt to changes in routine 'well.'" Tr. 1664. Hunter made those statements the Function Report he filled out in July of 2012, shortly after he had lost his job. Dr. Ciocca rendered his opinion in September of 2012. In November of 2012, the pressures of Hunter's physical illness, the loss of his job, financial problems, and a breakup with his fiancée resulted in his voluntary admission to the psychiatric unit at Concord Hospital. As between Hunter's statement that he handled stress well and Dr. Ciocca's opinion, Dr. Ciocca's opinion would seem to have been the more prescient. Plainly, the statements in Hunter's Function Report are not substantial evidence in support of the ALJ's decision to discount Dr. Ciocca's opinion.

The ALJ also stated that Dr. Ciocca's opinion was contradicted by Hunter's "somewhat robust level of activities."

Tr. 1664. In his report, Dr. Ciocca described Hunter's present daily activities this way:

Mr. Hunter reports that he gets out of bed around 11 o'clock, has something to eat and takes his medication, then gets on the couch, watching TV, and falls asleep. He has dinner and spends time with his fiancée, then falls asleep and goes to bed around nine or ten in the evening. He reports that he lacks drive and motivation, and as a result, does not do any housework. He states that he usually does not go out anywhere, and depends on his fiancée to shop and take care of their living space. He denies socializing with anyone and reports that he is basically isolated. He does go down [to] Boston periodically for the treatment of his vasculitis.

Tr. 1983. Leaving aside the question of whether the level of activity that Dr. Ciocca described is "somewhat robust," the court cannot see, and the ALJ does not explain, how Dr. Ciocca's opinion on Hunter's ability to tolerate workplace stressors is contradicted by the information he had on Hunter's daily activities, or by the daily activities Hunter listed in his Function Report, which are only modestly more ambitious than those he later reported to Dr. Hunter. As with the other factors cited by the ALJ, Hunter's daily activities are not substantial evidence supporting the ALJ's decision to discount Dr. Ciocca's opinion on Hunter's ability to tolerate workplace stressors.

The lack of substantial evidence to support the ALJ's decision to discount Dr. Ciocca's opinion on Hunter's ability to

tolerate stress is a second reason to remand this matter for further proceedings. That said, the court notes, briefly, several other meritorious issues raised by Hunter that should be addressed on remand.

First, Hunter argues that the ALJ failed to consider the combined effects of his HSP and his bipolar disorder. The applicable Social Security regulations provide that the SAA, and by extension, an ALJ, "will consider the combined effect of all of [a claimant's] impairments." 20 C.F.R. §§ 404.1523 & 416.923. The Acting Commissioner contends that the ALJ did consider the combined effects of Hunter's physical and mental impairments, but the portions of the ALJ's decision that the Acting Commissioner points to seem to be boilerplate recitations of various SSA regulations rather than an actual consideration of the effect of Hunter's HSP on his mental state. However, that specific issue is directly addressed in: (1) Dr. Ciocca's opinion, see Tr. 1983, 1985; (2) Dr. Harris's mental RFC assessment, see Tr. 1697, 1710; (3) the report generated upon Hunter's admission to Concord Hospital, see Tr. 2002-03; (4) Dr. Bice's initial progress note, see Tr. 1990; and (5) the report generated upon Hunter's admission to SNHMC, see Tr. 2012, 2014. Moreover, while the Acting Commissioner faults Hunter for failing to demonstrate that the combined effect of his physical

and mental impairments causes work-related functional limitations, Hunter explicitly argues that the ALJ erred in his evaluation of Dr. Ciocca's opinion that his mental impairment limits his ability to tolerate workplace stressors, and Dr. Ciocca's opinion also expressly considered Hunter's physical and mental impairments in combination. That suffices to demonstrate a work-related limitation caused by the combination of Hunter's HSP and his bipolar disorder. In short, the volume and the specificity of the evidence directly linking Hunter's physical impairment to his mental impairment, and linking the combined effect of those impairments to an inability to tolerate workplace stressors, merits more than a rote citation of boilerplate language.

Second, Hunter argues that the ALJ failed to properly consider his recent mental health treatment, i.e., his two hospital admissions for psychiatric care and his course of counseling with Bice. The Acting Commissioner correctly points out that the ALJ did mention Hunter's hospitalizations in his decision. But the manner in which he did so is problematic. In the section of his decision devoted to an assessment of the credibility of Hunter's statements about his symptoms, the ALJ says this:

Although the evidence reflects [that] the claimant required two psychiatric hospitalizations for suicidal


and homicidal ideation . . . the record reflects [that] these were due to a number of tangential psychosocial stressors, like the loss of his job, his breaking up with his girlfriend, and his having been denied disability benefits.

Tr. 1662. Given that there is no evidence that Hunter has gotten a job, reunited with his girlfriend, or received benefits, those stressors would all seem to remain in play, and it is difficult to see what the ALJ meant by calling those stressors "tangential." Moreover, in light of the foregoing discussion of the ALJ's treatment of Hunter's impairments in combination, the court cannot help but note that the ALJ's list of "tangential psychosocial stressors" omits any mention of his HSP, despite explicit mention of that particular stressor in the reports generated by both of Hunter's psychiatric admissions. See Tr. 2003 ("This is a 48-year-old man with a lengthy history of a successful business career, who has fallen upon much more difficult times subsequent to learning of his kidney disease."), 2012, 2014 ("The patient apparently has had a longstanding history of mood variability, complicated by alcohol abuse. More recently, his situation has been complicated by a diagnosis of Henoch-Schonlein purpura and ongoing uses of prednisone."). On remand, Hunter's mental-health treatment should be considered in a less dismissive manner.

IV. Conclusion

For the reasons detailed above, the Acting Commissioner's motion for an order affirming her decision, document no. 14, should be denied, Hunter's motion to reverse that decision, document no. 10, should be granted, and this matter should be remanded to the Acting Commissioner for further proceedings, pursuant to sentence four of 42 U.S.C. § 405(g). The clerk of the court should be directed to enter judgment in accordance with this order and close the case.

Any objection to this report and recommendation must be filed within 14 days of receipt of this notice. See Fed. R. Civ. P. 72(b)(2). Failure to file an objection within the specified time waives the right to appeal the district court's order. See United States v. De Jesús-Viera, 655 F.3d 52, 57 (1st Cir. 2011); Sch. Union No. 37 v. United Nat'l Ins. Co., 617 F.3d 554, 564 (1st Cir. 2010) (only issues fairly raised by objections to magistrate judge's report are subject to review by district court; issues not preserved by such objection are precluded on appeal).


Andrea K. Johnstone
United States Magistrate Judge

October 13, 2016

cc: Laurie Smith Young, Esq.
Terry L. Ollila, Esq.

